

South Carolina State Conference of The NAACP, et al. v. Ellen Weaver in her official capacity as South Carolina Superintendent of Education, et al.

Civil Action No.: 3:25-cv-487-SAL

Exhibit F

**to Defendants Weaver's and Lexington County School District Three's Response in
Opposition to Plaintiffs' Motion for a Preliminary Injunction**

Expert Declaration of Professor David Bernstein

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

SOUTH CAROLINA STATE CONFERENCE OF
THE NAACP; IBRAM X. KENDI; AYANNA
MAYES; MARY WOOD; T.R., a minor by and
through their father and next friend, TODD RUTH-
ERFORD; and J.S., a minor by and through their
mother and next friend, AMANDA BRADLEY,

Plaintiffs,

Civil Action No. 3:25-cv-487-SAL

v.

ELLEN WEAVER in her official capacity as South
Carolina Superintendent of Education; LEXINGTON
COUNTY SCHOOL DISTRICT THREE; and
SCHOOL DISTRICT FIVE OF LEXINGTON &
RICHLAND COUNTIES,

Defendants.

EXPERT DECLARATION OF PROFESSOR DAVID E. BERNSTEIN

I, **David E. Bernstein**, declare pursuant to 28 U.S.C. § 1746 as follows:

1. My name is David E. Bernstein. I have been retained to render opinions regarding the historical accuracy of the factual and historical account contained in *Stamped: Racism, Antiracism, and You* (“*Stamped*”), by Ibram X. Kendi and Jason Reynolds (“the authors”). My opinions are based on my knowledge, education, training, and experience, and the records and materials I have reviewed regarding this matter.¹
2. I am a Distinguished University Professor at the Antonin Scalia Law School at George Mason University. In addition, I serve as the Executive Director of the Law School’s Center for Liberty & Law. I have during my career also served as a visiting professor at the William and Mary School of Law, the Brooklyn School of Law, the University of Michigan Law School, Georgetown University Law Center, and Columbia Law School.
3. A true and correct copy of my curriculum vitae is attached as Exhibit A.

¹ I have previously offered an expert declaration regarding *Stamped* in another case pending in the United States District Court for the District of South Carolina bearing the caption *Pickens County Branch of the NAACP et al. v. School District of Pickens County*, C/A No. 8:23-cv-01737-JDA (D.S.C.). This declaration is substantially identical to the expert declaration I submitted in that case.

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4. I received my B.A., summa cum laude, in history from Brandeis University in 1988. I received my law degree from Yale Law School in 1991. While in law school, I served as a Senior Editor of the Yale Law Journal, as a John M. Olin Fellow in Law, Economics, and Public Policy, and as a Lambe Fellow of the Institute for Humane Studies.
5. During my professional career in academia, I have written and published many books, book chapters, and articles on topics relating to the history of race in America. These published works include the following:
 - a. *Classified: The Untold Story of Racial Classification in America* (Post Hill Press 2022)
 - b. *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (Duke University Press 2001)
 - c. Judicial Power and Civil Rights Reconsidered, 114 *Yale L. J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (with Ilya Somin)
 - d. The Modern American Law of Race. 94 *S. Calif L. Rev.* 171 (2021)
 - e. Railroad Unions, Racism, and Labor Regulations, 5 *Independent Rev.* 237 (2000)
 - f. Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African Americans, 30 *San Diego L. Rev.* 89 (1994)
 - g. Roots of the ‘Underclass’: The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 *Am. U. L. Rev.* 85 (1993)
 - h. Prevailing Wage Legislation and the Continuing Significance of Race, 44 *Notre Dame J. Leg.* 158 (2018)
 - i. Review of Richard C. Cortner, Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases, *Ideas on Liberty*, Nov. 2002

A complete list of my writing, including other publications relevant to the topic described above, can be found in my CV, attached hereto as Exhibit A.

6. In 2019, I became aware of controversy related to *Stamped* and its use in public schools. Out of professional interest and personal curiosity, I read and analyzed the book and found a number of errors and distortions. The conclusions I formed regarding *Stamped* and the historical veracity of its account were formed on my own. A non-exhaustive list of such factual errors and distortions includes:

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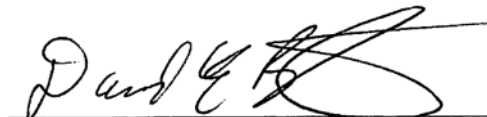
- a. In the Preface to *Stamped*, coauthor Kendi divides those involved in the debate over the status of black Americans into three groups, segregationists, assimilationists, and antiracists. Both segregationists and assimilationists have “racist positions” and “think Black people are to blame for racial inequity.” The authors later identify as “assimilationists” such prominent civil rights figures as Frederick Douglass, Booker T. Washington, W.E.B. DuBois, and Martin Luther King, Jr. In other words, each of these individuals are depicted as having and promoting racist ideas. Calling Douglass’ or King’s ideas “racist” is an outrageous distortion in support of Kendi’s idiosyncratic and unjustified belief that anyone who doesn’t share his self-styled antiracist philosophy is racist. (And it bears noting the irony that several modern figures whom Kendi praises as “antiracists” have or had a history of antisemitism.)
- b. On pages 172-173, *Stamped* suggests that not only was the 1964 Civil Rights Act ineffectual in advancing the rights of black Americans, the Act also caused “a racist backlash.” Angela Davis and Malcolm X were right in opposing the Act, the authors claim, because the law not going to be enforced by the racist white establishment. In fact, there was no racist backlash. Racism continued a long-term decline. Acceptance of interracial marriage, for example, rose from 4% in 1958 to 94% in 2021. Nor was there a failure to enforce the Act. Southern businesses went from mainly segregated in 1964 to almost all integrated by 1970. The new Equal Employment Opportunity Commission aggressively enforced the provisions of the Act banning discrimination in employment.
- c. On page 174, *Stamped* states that 1964 presidential candidate Barry Goldwater opposed federal spending because it was going to help black people for the first time. (“This racist epiphany hit Goldwater once Black people were receiving government assistance. too.”) In fact, before he ran for president, Goldwater (a) was a consistent opponent of increased federal spending dating back to the 1940s; and (b) a strong supporter of racial integration (including in his family’s own businesses) and of the Ideal NAACP and National Urban League chapters. The notion that Goldwater suddenly had a “racist epiphany” about federal spending is simply invented out of whole cloth by the authors.
- d. On page 206, the authors assert that “(President Ronald) Reagan’s economic policies caused unemployment to skyrocket.” In fact, after one recession early in Reagan’s presidency, generally attributed to the Federal Reserve’s high interest rate policy, unemployment steadily declined throughout Reagan’s tenure. When Reagan left office in January 1989, the unemployment rate was approximately 5.3%, down from approximately 7.5% when he became president.
- e. The authors allege that *Washington Post* columnist Charles Krauthammer invented the term “crack baby” in 1989. “Krauthammer and racists,” they write, “had basically figured out how to create a generation of black criminals in their

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minds.” Krauthammer first used the phrase “crack baby” in July 1989. The *New York Times* had used it in an editorial several months earlier, apparently utilizing a phrase already in use in medical and public health circles. Editorial, *Mothers, Babies, and Crack*, N.Y. TIMES, May 14, 1989. Thus, as even a cursory Google search would have revealed to the authors, Krauthammer did not invent the term. And contrary to the authors’ suggestion that the phrase was invented by Krauthammer to demonize black people, the Times’ editorial never mentions race, explicitly opposed punishing drug-addicted pregnant women, and called for large-scale investments in programs to help such women and their offspring.

- f. The main hero of *Stamped* is Angela Davis. Davis’s personal history and significance are consistently distorted by the authors to support their narrative. For example, the authors write that Davis left the Communist Party, USA in 1991 because it was not acknowledging racism, sexism, and elitism. In fact, as a tool of the Soviet Union, the Party basically collapsed with the fall of Soviet Communism. On page 225, the authors state that in 1995 Davis was “still a threat.” In fact, Davis was always a fringe figure in American politics, except in far-left activist circles. Nevertheless, the authors consistently write about her as if she was and is a major force.
7. These and other examples of historical errors, omissions, and distortions in *Stamped* lead me to conclude that the book’s narrative regarding American history is inaccurate, unreliable, and presents an extremely distorted view of the history it recounts. In the case of many of the errors, even rudimentary fact-checking would have caught them.
8. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 17th day of April, 2025.



David E. Bernstein

Exhibit A

to the Declaration of Professor David E. Bernstein

Curriculum Vitae

DAVID E. BERNSTEIN

Antonin Scalia Law School
George Mason University
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Arlington, Virginia 22201
Office Phone: 703/993-8089
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EMPLOYMENT**Antonin Scalia Law School, George Mason University**

University Professor, 2017-present

Executive Director, Liberty & Law Center, 2017-present (have raised over \$3 million in that role)

George Mason University Foundation Professor, August 2010—2017

Professor, August 2002-August 2010

Associate Professor, September 1998-August 2002

Assistant Professor, August 1995-August 1998

Hebrew University

Visiting Professor, December 2022

University of Turin

Visiting Professor, Summer 2021 (virtual due to Covid travel restrictions)

William and Mary Law School

Visiting Professor, Spring 2014 (short course)

Brooklyn Law School

Visiting Professor, Fall 2006

University of Michigan Law School

Visiting Professor, Fall 2005-Spring 2006

Georgetown University Law Center

Visiting Professor, Spring 2003

John M. Olin Foundation

Junior Faculty Fellow, 1997-98 (paid research leave awarded to five humanities scholars nationwide)

Columbia Law School

Mellon Foundation Fellow, Julius Silver Program in Law, Science, and Technology, 1994-95

Crowell & Moring

Associate, 1992-94

Honorable David A. Nelson

Sixth Circuit U.S. Court of Appeals

Law Clerk, 1991-92

SELECTED PUBLICATIONS**Books**

Classified: The Untold Story of Racial Classification in America (Post Hill Press 2022)

Rehabilitating Lochner: Defending Individual Rights against Progressive Reform (University of Chicago Press 2011; paperback 2012)

The New Wigmore: Expert Evidence (Aspen Law and Business 2004 and annual supplements; 3d edition 2020) (with Kaye and Mnookin)

You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute 2003; paperback 2004)

Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (Duke University Press 2001)

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Judicial Power and Civil Rights Reconsidered, 114 *Yale L.J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (with Ilya Somin)

Lochner's Feminist Legacy, 101 *Mich. L. Rev.* 2176 (2003) (review essay of Julie Novkov, *Constituting Workers, Protecting Women*)

Lochner's Legacy's Legacy, 82 *Tex. L. Rev.* 1 (2003)

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Co-author of several chapters and coeditor of *Phantom Risk: Scientific Inference and the Law* (MIT Press 1993)

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Shorter Publications

Unchecking the Box, *Brandeis Magazine*, Winter 2023

Diversity by Diktat: An Obscure 1977 OMB Memo Forms the Basis for Today's Affirmative-Action Programs, SCOTUSblog, Oct. 6, 2022

Review of Adam Winkler, *We the Corporations*, *Claremont Review*, Feb. 2019

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Munn v. Illinois, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Allgeyer v. Louisiana, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Buchanan v. Warley, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Emigrant Agent Laws, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Review of Paul Moreno, *Blacks and Organized Labor: A New History*, *Independent Review* (Dec. 2006)

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The Right to Petition, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

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Review of Ken Kersch, *Constructing Civil Liberties*, *American Historical Rev.*, Oct. 2005

Peg-Leg Williams, in *One Hundred Americans Making Constitutional History* (Melvin Urofsky, ed. 2004)

Review of Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, *American J. Legal History* (2003)

Review of Michael J. Phillips, *The Lochner Court Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, *Law & History Rev.* (Winter 2003)

Let Private Colleges Practice Affirmative Action, *Cato Daily J.* (and syndicated newspapers), June 23, 2003 (op-ed)

Free Speech? Not on Campus, *Orange County Register*, Oct. 21, 2003 (op-ed)

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Disinterested in *Daubert*: State Courts Lag Behind in Opposing “Junk” Science, Washington Legal Foundation, Legal Opinion Letter (June 21, 2002)

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The ACLU Has Lost its Way, *Cincinnati Enquirer*, May 16, 2000, at 8 (also published in other newspapers) (op-ed)

Anti-Bias Laws vs. Civil Liberties, *Wash. Times*, Aug. 15, 1999 (op-ed)

Review of Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Eh.net—economic historians' listserv)

Comment on *Kumho Tire*, *AALS Section on Evidence Newsletter*, Spring 1999, at 3

Letter to the Editor, Judge was Correct to Exclude Testimony, *Legal Times*, April 12, 1999, at 23
Comment on Gary Edmond and David Mercer, The Politics of Jury Competence, in *Technology and Public Participation* (Xlibris 1999)

A Breast Bone of Contention, *Los Angeles Daily J.*, Aug. 26, 1998, also published in *Litigation News*, Winter 1998, at 7 (op-ed)

Review of *Science on Trial*, *Litigation News*, Spring 1997, at 4

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PROFESSIONAL SERVICE

Academic Referee: *American Journal of Legal History*, *Cambridge University Press*, *Columbia Law Review*, *Harvard Law Review*, *Independent Review*, *Journal of American History*, *Jurimetrics*, *Law and History Review*, *Law and Social Inquiry*, *Law and Society Review*, *Oxford University Press*, *Supreme Court Economic Review*, *Yale Law Journal*, *Yale University Press*, among others.

AALS Section on Evidence

Chair, 2005; Chair-elect, 2004; Secretary 2003

Cato Supreme Court Review

Board of Editors, 2003-present

George Mason University School of Law

Annual committee service, including seven-time chair of the appointments committee

EDUCATION

Yale Law School

J.D. 1991

Senior Editor, *Yale Law Journal*

John M. Olin Fellow in Law, Economics, and Public Policy

Lambe Fellow, Institute for Humane Studies

Brandeis University

B.A. *Summa cum laude* (History) 1988

Phi Beta Kappa